

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

RODOLFO GUTIERREZ
Claimant

APPEAL NO: 09A-UI-17278-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE BRANDS LLC
Employer

OC: 10-18-09
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 9, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 23, 2009. The claimant participated in the hearing with Production Worker Sandra Salaya and Interpreter Ike Rocha. Kathy Waterman, Human Resources Representative and Laura Mouw, Benefit Coordinator, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired as a full-time production worker for Advance Brands from December 15, 2008 to October 22, 2009. On January 13, 2009, the employer received an e-mail from an employee stating the claimant was calling another employee names and swearing at her. The claimant denied the accusation and the superintendant told the claimant he needed to respect people if he was going to continue working there and the next incident would result in suspension or termination. On February 17, 2009, the claimant received a one-day suspension for verbally abusing another employee after being verbally warned about that type of behavior the previous month. On March 23, 2009, the claimant was late returning from break and was told the next incident of any kind would result in termination. On October 22, 2009, the employer received an e-mail from the second shift superintendant about the claimant's behavior the evening of October 21, 2009. The e-mail stated, "At the end of the night we had an employee come to the office with a complaint about Junior (the claimant). The employee told her supervisor the claimant was taking pictures "of her butt." The employee's supervisor asked her to complete a written statement in which she said, "Today, October 21, 2009, after second break, Junior was walking behind me and asked if he could take a picture of me. I said 'no' and I turned around and he was taking pictures of my butt. I told him to stop more than three times and he wouldn't. He said he wanted pictures of my butt because he wanted to show his friends what he was working with. After that I told him not to talk to me or I would take it to the office.

He has always made rude comments to me and I always ignored him. He thought by buying me an ice cream it would be okay. I just had enough today.” That employee’s friend/co-worker said the claimant was bragging to his friend about the good looking girls he worked with so he wanted to take pictures of their butts to show his friends. The claimant denied doing anything wrong and said “people” were making up stories about him and he got “caught up in a scandal” with regard to all of the incidents he was verbally warned or suspended about as well as the last incident. When the employer met with the claimant the next day about the final situation it asked to see his cell phone. He initially refused but the employer told him if he did not show his phone he would be discharged because it would presume guilt so the claimant allowed the employer to look at his phone. There were no pictures of his co-worker’s butt on his cell phone but the claimant had several other inappropriate pictures on his phone and several hours to delete the pictures of his co-worker after she threatened to go to the office about the incident. After considering the final episode and reviewing the claimant’s history of harassing female co-workers the employer terminated the claimant’s employment October 22, 2009.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to disqualifying job misconduct.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. “Misconduct” is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The claimant harassed a co-worker by taking pictures of her butt after she told him not to do so at least three times. He stated he wanted to take pictures of her butt so he could show his friends "what (he) was working with." While the claimant denies the last incident he testified that an operator questioned him about the pictures after talking to the woman who stated he took the pictures of her. The situation was also witnessed by the woman walking with the co-worker who said the claimant was taking pictures of her. The claimant demonstrated a history of disrespecting female co-workers despite being warned and talked to about his behavior. The administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

DECISION:

The November 9, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css